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A Monthly Legal Newsletter from

Querrey & Harrow

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CHICAGO
175 W. Jackson Boulevard
Chicago, IL 60604
Tel: 312.540.7000
Toll Free: 800.678.2756

JOLIET, IL
3180 Theodore Street
Joliet, IL 60435
Tel: 815.726.1600

MERRILLVILLE, IN
233 East 84th Drive
Merrillville, IN 46410
Tel: 219.738.1820

OAK LAWN, IL
4450 W. 103rd Street
Oak Lawn, IL 60653
Tel: 708.424.0200

PEORIA, IL
416 Main Street
Peoria, IL 61602
Tel: 309.676.7777

WAUKEGAN, IL
415 W. Washington Street
Waukegan, IL 60085
Tel: 847.249.4400

WHEATON, IL
300 S. County Farm Road
Wheaton, IL 60187
Tel: 630.653.2600

Bankruptcy Law Update: Instructive Guide For Sellers Seeking To Reclaim Their Goods After Their Customer Files For Bankruptcy

By: Christopher Harney – Chicago office.

If your company is in the business of selling goods, you have probably found yourself in the all too common situation: You sell goods to a customer on credit only to find out after the goods are delivered that the buyer is insolvent. Typically, you would look to Section 2-702 of the Uniform Commercial Code for relief. Section 2-702 allows a seller to reclaim goods, upon demand, within ten days after receipt, if you discover that the buyer received goods on credit while insolvent. Under Section 2-702, your rights to reclaim the goods will be limited to those goods that the buyer received in the ten days prior to your demand.

Given the current market, reclaiming your goods might not be as simple as merely following procedures under Section 2-702 of the UCC. Instead, you are now probably faced with many customers who file for Chapter 7 or Chapter 11 Bankruptcy. Once a customer files for Bankruptcy, your company must file proof of claim in the bankruptcy court, as an unsecured creditor, often with dim prospects on receiving little, if any, compensation in return for the goods previously delivered.
Fortunately, if you follow the proper procedure required by the Bankruptcy Code, your company may be able to reclaim the goods sold to the customer, now debtor. Under Section 546(c) of the Bankruptcy Code, you can reclaim good received by the debtor within forty-five (45) days of the bankruptcy filing. In order to invoke Section 546(c) the following must be satisfied:

1. the goods must have been sold in the 'ordinary course' of your business;

2. the debtor must have received the goods while insolvent; and

3. You must have sent the customer a written reclamation demand within forty-five (45) days of the debtor's receipt of the goods; or

4. If the 45-day reclamation demand period expires after the bankruptcy case is filed, you must make the reclamation demand within twenty (20) days after the bankruptcy filing.

Moreover, it is crucial to make sure that your demand for reclamation is properly drafted to ensure your reclamation rights under the Bankruptcy Code. For example, you should be sure to include the following in your demand:

1. State that you are making a demand for reclamation under Section 2-702 of the Uniform Commercial Code, Section 546(c) of the Bankruptcy Code, and under any other applicable state statutes;

2. Clearly identify the goods being reclaimed, including attaching any invoices or other documents identifying the goods;

3. Request a written confirmation of the customer's possession and/or receipt of the goods along with an inventory of the goods; and

4. Direct the customer to segregate the goods

Furthermore, you must ensure that your reclamation demand was addressed to the correct customer and to its current address. Therefore, it is also important to send the reclamation demand via certified mail or any other delivery means that allows you to confirm the customer received your reclamation demand. It is further advisable to file a notice of reclamation claim with the Bankruptcy Court to further protect your reclamation rights. If you follow these steps, you will be in the prime position of reclaiming your goods as far back as 45 days prior to the customer filing for bankruptcy.

Please note, however, that while this article seeks to provide you with illustrative reclamation demand requirements, you should seek counsel to ensure your compliance with the more technical requirements of reclaiming your goods under the Bankruptcy Code and your compliance with any state law variations. Moreover, with the aid of counsel experienced in Bankruptcy law, you will be able to explore all available avenues for relief under the Bankruptcy Code such as Section 503(b)(9), which allows a priority claim, paid before all other unsecured creditors, for the value of goods sold in the ordinary course of business and received by the debtor within 20 days prior to the bankruptcy filing.

Regardless of whether you are seeking reclamation under Section 546(c) or relief under another Section of the Bankruptcy Code, you must be sure to follow all of the Code's requirements, even those requiring your compliance prior to your customer's bankruptcy filing. While sending a demand for reclamation at the first discovery of your customer's insolvency may be a burden, failing to send your demand may result in your company being one of many uncompensated unsecured creditors stripped of their goods.

* * *

***Christopher Harney**, an associate in our Chicago office, concentrates his practice in bankruptcy matters, construction liens/disputes and mortgage foreclosures. He also currently assists in a variety of general litigation matters, including: premises liability, drafting commercial contract provisions and auto liability cases. If you have any questions regarding this article, please contact Chris via charney@querrey.com, or via 312-540-7622.*

Practice Group Focus:
Q&H's Bankruptcy and Creditors' Remedies Practice Group

Attorneys

- **Robert R. Benjamin, Chairperson**
- **Beverly A. Berneman**
- **John M. Brom**
- **Thomas P. Carney, Jr.**
- **Christopher J. Harney**
- **Eileen M. Sethna**

Our attorneys have experience in all aspects of bankruptcy. With an active bankruptcy practice comes the responsibility of representing both the debtor and the creditor. In situations of bankruptcy, all parties have rights, and our job is to ensure that these rights are protected.

Creditors' Remedies

Our well-respected team represents entrepreneurs and businesses throughout the Midwest in shareholder derivative suits, partnership disputes, commercial landlord tenant litigation and real estate matters from "Quick Take" condemnation matters to partition suits. Our broad range of knowledge can provide insights into all business disputes.

Because of our extensive experience in protecting creditors, we have been entrusted with the claims of creditors in hundreds of cases. We have represented banks, finance companies, leasing companies and holders of all types of claims in bankruptcy matters. The following examples illustrate our experience in this area.

- We have represented banks and finance companies in negotiating and drafting financing orders in reorganization proceedings which have preserved the creditor's interests in the estate.
- We have brought adversary complaints in areas such as to determine the extent and priority of liens, to object to discharge and to object the dischargeability of debts.
- We have defended adversary suits to recover preferences and to set aside fraudulent conveyances.

- We successfully and quickly assert reclamation claims on behalf of vendors assuring their status as a priority administrative creditor.
- We often represent groups of similarly situated creditors in nationally recognized mega-cases such as K-Mart, LTV, Conseco Insurance and United Airlines.

Our skilled practitioners have worked with both common law and statutorily appointed receivers to liquidate businesses for the benefit of creditors.

Business Bankruptcy and Dissolution

In recent years, our bankruptcy and creditors' remedies attorneys have focused on the reorganizations of small to mid-size firms. Our both practical and scholarly approach has resulted in trailblazing areas of the law such as executory contracts, avoidance powers and sales of assets. A large majority of our reorganization cases have ended in confirmed plans. The confirmed plans have allowed our clients a fresh start that is unburdened by the debts of the past.

Our knowledge of the areas of Intellectual Property Law and Information Technology Law has made us uniquely qualified to represent troubled business debtors in those industries. Companies that prospered during the technology boom are now experiencing financial constraints. We are committed to helping these businesses survive economic downturns whenever possible.

Our attorneys have also guided clients through non-bankruptcy alternatives. We can suggest options that are designed to satisfy creditors or to protect the principals from liability.

Consumer Bankruptcies

Our bankruptcy and creditors' remedies attorneys have represented hundreds of individuals in liquidation as well as reorganization proceedings. We appreciate that people in financial trouble need compassion and understanding as well as real answers to their financial problems. Individual debtors get the benefit of a hands-on approach not always available in the area of consumer bankruptcies.

Debtors' Services

We represent individuals and businesses as they work through their financial affairs in Bankruptcy Court. As a former Chapter 7 Bankruptcy trustee, Group Chair Robert Benjamin has the knowledge and experience necessary to create an ideal plan to suit each individual case. Our firm understands the turmoil associated with filing for bankruptcy and works toward protecting you as a debtor from creditors. We derive both personal and professional satisfaction in guiding our clients through hard times towards financial stability.

We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code, proudly serving creditors, debtors and trustees throughout the United States of America with 65 years combined experience.

Q&H Obtains Dismissal of Civil Rights Claims Against Three Officers Following From Fight and Arrest at Chicago White Sox Game

Chicago office shareholder **Terrence Guolee** and associate **Matt Daley** recently obtained an order dismissing negligence and Section 1983 excessive force and false arrest civil rights claims against three officers from a suburban Chicago police department. In the case, the off-duty officers responded to a fight in a beer line between a fellow officer and another man at a Chicago White Sox game, subduing the man. Following the acquittal of criminal charges against the other man, the man filed claims against the officers asserting they used excessive force and falsely arrested him. However, Terrence and Matt obtained an order dismissing the cases as having been filed outside applicable statutes of limitation.

Seventh Circuit Affirms Summary Judgment Finding No Municipal Liability

By: Ghazal Sharifi – Chicago office

The Seventh Circuit Appellate Court of Appeals recently affirmed a district court's grant of summary judgment to the Village of Thornton, in a sensitive case involving sexual molestation, where the Plaintiff failed to establish any municipal liability. *Wragg v. Village of Thornton,* No. 08-3766 (7th Cir. May 7, 2010). The decision affords municipal defendants strong defenses on *Monell* claims based on alleged improper retention of employees.

In the case, the sixteen-year old plaintiff, Wragg, was sexually molested by the Village's fire chief, Klaczak in 2001. Klaczak was arrested for the sexual molestation six months after it occurred. Village President, Jack Swan, removed Klaczak the same day he was arrested from his position as fire chief. Wragg later sued pursuant to 42 U.S.C. § 1983 alleging that the Village violated his substantive due process rights. Wragg sued defendants, Klaczak, Swan, and the Board of Fire and Police Commissioners. He alleged that the defendants violated his rights by deliberately retaining Klaczak in his position as fire chief, despite knowing of Klaczak's propensity to molest minors, and the Village's deliberate indifferent employee retention policy.

The Seventh Circuit determined that Wragg did have a substantive due process right to not be harmed by Klaczak because Klaczak was a governmental actor. Thus, the court focused the majority of its analysis on whether Klaczak's violation of Wragg's constitutional rights imputed liability to the Village.

Under *Monell v. Dep't of Soc. Servs.*,436 U.S. 658 (1978), a municipality can be held liable for a breach of a plaintiff's constitutional rights pursuant to § 1983. To succeed on a *Monell* claim, the plaintiff must establish that the municipality violated his or her rights through an official policy or custom. A plaintiff can establish a *Monell* claim in three ways: that the constitutional injury occurred as a result of (1) the enforcement of an express policy of the municipality; (2) a widespread practice that is so permanent and well settled as to constitute a custom or usage with the force of law; or (3) the injury was caused by a person with final policymaking authority.

Q&H Wins Two Civil Rights Cases in Seventh Circuit

Congratulations to Q&H Shareholders **Dan Gallagher, Terrence Guolee, Dominick Lanzito** and **Christopher Keleher** who received two orders on April 22, 2010 from the Seventh Circuit Court of Appeals affirming summary judgment orders obtained in the Federal District Court for the Northern District of Illinois, Eastern Division.

In the cases, two Cook County Jail Guards alleged various civil rights violations and malicious prosecution claims following their being suspended with pay and eventually arrested after being identified by female jail detainees as having had sexual relations with prisoners. Following being acquitted of the criminal charges in their criminal trials, the guards sued. Q&H attorneys were then appointed by the Cook County Chancery Court as Special State's Attorneys to represent the Cook County Sheriff's Office and various management personnel in the office.

Following very extensive investigation and discovery, Q&H documented that the suspensions and the officers' arrests were proper based on the probable cause that existed to show that the officers had potentially engaged in criminal behavior and had violated various rules of the Cook County Department of Corrections.

The cases are reported at: Swearnigen-El v. Cook County Sheriff's Dept., No. 09-2709 (April 22, 2010) and Egonmwan v. Cook County Sheriff's Dept., No. 09-2764 (April 22, 2010).

The Seventh Circuit found that Wragg failed to show any express policy of the Village that may have caused him any injury. In addition, Wragg failed to show a widespread practice to constitute a custom or usage with the force of law. Thus, the remainder of the court's analysis focused on whether Wragg established that his injury was caused by a person with final policymaking authority.

The Village argued that Wragg waived his *Monell* claim when he failed to identify what persons in the Village had final policymaking authority. Wragg argued that all of the defendants that he claimed acted with deliberate indifference were final policymakers. The court refused to conduct an analysis of waiver, because the plaintiff's *Monell* claim failed for other reasons. However, the court did issue a cautionary note, "[t]rying to accuse every Village official, as a strategy to establish municipal liability, is unhelpful; it distracts the parties and courts from focusing on the particular final policymaker whose actions are essential to the claim."

Regardless of the waiver argument, the court went into a lengthy analysis of the identity of the final policymaker. The district court had concluded that the Board of Trustees was the final policymaker. The Seventh Circuit did not see it so clearly because it wanted to evaluate the identity of the final policymaker on a particular policy and not every policy. It noted that there are a number of factors that it uses to assess whether an actor or actors have final policymaking authority: (1) lack of constraint by policies made by others; (2) lack of meaningful review; and (3) a grant of authority to make the policy decision. The court noted that while the Board had the authority to appoint and remove appointed officers, the authority to retain Klaczak was solely Swan's without being subject to any meaningful review. Thus, the question of whether Swan was the final policymaker hinged on whether Swan was constrained by any policy of the Village. The answer was not conclusive.

The Village's sexual harassment policy required appropriate discipline for those who violated the policy, but not removal from his or her position. In addition, the court could not tell whether Village policy required Swan, as the president, or some other official, to conduct an investigation of the sexual misconduct allegations against Klaczak. Ultimately, the court found that if there was a policy requiring Swan to investigate allegations, then the Village was the final policymaker. If there was no requirement of Swan, then Swan would be the final policymaker because he was not constrained by Village policy.

COMMUNITY INVOLVEMENT

Berneman and Rubin Present at 2nd Annual Midwest Publishers Conference

On May 10, 2010, Bev Berneman and Len Rubin presented a debate entitled, "Robinhood of the Cyberwood Forest - Copyright, Permissions, and International Piracy"at Cadmus Institute's 2nd Annual Midwest Publisher's Conference. The 1-day conference took place at the Blackstone Hotel in Chicago.

Schoumacher Presents ISBA Construction Law CLE - Overview of Recent Construction Law Cases

In April, 2010, **Bruce Schoumacher** participated in a CLE seminar entitled, "Construction Law--What's New in 2010?," presented by the ISBA Special Committee on Construction and co-sponsored by the ISBA Real Estate Section. His seminar materials included a review of recent cases that have affected the construction industry. If you have questions concerning the content of this publication, please contact Bruce Schoumacher via 312-540-7046 or bschoumacher@querrey.com.

A copy of Q&H's update on recent construction law cases is available here: Recent_Const_Law_2010.pdf.

Regardless of whether Swan or the Board was the final policymaker, the court still found that Wragg's claim failed. To bind a municipality, the Plaintiff must establish deliberate indifference, meaning that the municipality must have subjective awareness of a substantial risk of a constitutional violation. Establishing that a defendant should have known of the risks is insufficient.

The court noted that there was no evidence for a fact finder to find that either Swan or the Board knew that retaining Klaczak would pose a "substantial risk." It came to this conclusion despite the fact that Swan had knowledge of other circumstances surrounding Klaczak. First, Swan had knowledge that two anonymous parents placed calls to the police department in 1997 claiming that Klaczak (then a police officer) molested their children. The court found this knowledge insufficient because there was no investigation and the parents remained anonymous.

Second, Swan heard and witnessed many fire department members commenting on Klaczak's propensity to sexually molest minor children. The court found this knowledge insufficient because numerous witnesses testified that these statements were nothing but cruel humor and firehouse antics.

Third, Swan might have heard from another member of the department that Klaczak had sexual contact with fire cadets. The court found this knowledge insufficient because those statements were not properly recalled and the basis of the knowledge came through rumors. Finally, Swan knew that Klaczak had a prior cocaine addiction and had drug and alcohol-related misconduct with fire cadets. The court also found this knowledge to be insufficient because it is unrelated to the allegations of sexual abuse. Therefore, despite all of the above incidents, the court found that no reasonable fact-finder could find that Swan acted with deliberate indifference to hold the Village liable for his decisions and inaction.

The court also held that, even if the Board of Trustees was the final policymaker, it could not be liable. The court found that the rest of the Board could not be held liable for the actions of Klaczak alone. It held that the plaintiff failed to establish any knowledge by a quorum of the Board of Klaczak's behavior to hold the Village liable for the Board's inaction. Without meeting any of the elements required to establish *Monel* liability, the court held that summary judgment for the defendants was proper.

The *Wragg* decision sheds light on a number of issues regarding the "policymaker" approach to *Monell* claims. First, the decision reveals that the court frowns upon plaintiffs identifying all defendants as the "policymakers" without pointing to specific policymaker(s). Second, it reveals that once, and if, the plaintiff identifies the policymaker(s), it must establish their authority as to a particular policy and not just policies in general. Third, it reveals that the "knowledge" requirement for deliberate indifference is a difficult bar to meet. Mere coincidental knowledge of facts related to a possible constitutional violation may be insufficient to show deliberate indifference. Specifically, negligent actions of a policymaker do not amount to deliberate indifference to bind the municipality.

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***Ghazal Sharifi**, an associate in our Chicago office, concentrates her practice in general litigation and is a member of the firm's Municipal Liability Practice Group. Our attorneys represent governmental bodies, including the State of Illinois, counties, municipalities, townships, school districts, park districts, elected officials and employees, in litigation involving 1983 civil rights, reapportionment, employment, eminent domain, premises liability claims and provide various other legal services to municipalities throughout the state. If you have any questions regarding Querrey & Harrow's municipal practice, contact group Chair, Dan Gallagher, at 312-540-7674, or via dgallagher@querrey.com.*

7th Circuit Confirms Defendants' Obligation to Request a *Devenpeck* Instruction

By: Patrick Connelly – Chicago office

Police Officers are routinely required to make split second decisions regarding the probable cause to arrest a person and eventually under which statute to charge. Obviously, police officers are not required to memorize the entire Illinois Criminal Code or their respective municipal codes - nor does the law require them to. The Supreme Court made sure of this in *Devenpeck v. Alford*, 543 U.S. 146, (2004) when it held that an arrest is reasonable under the Fourth Amendment, so long as there is probable cause to believe that *some* crime has been committed. As evidenced by a recent opinion from the Northern District of Illinois, it is crucial for attorneys defending Police Officers in False Arrest cases to request a *Devenpeck* instruction at trial where the facts support probable cause for crimes other than ones in which Plaintiff was actually charged. Should the instruction be denied it is equally important to preserve an objection to the denial on the record.

In *Fox v. Hayes*, No. 08-3736 (April 7, 2010), the Seventh Circuit affirmed a jury verdict finding law enforcement officers liable for False Arrest and Malicious Prosecution stemming from a murder investigation of three-year old girl. On appeal the Defendants asserted for the first time that the trial court erred by not submitting a *Devenpeck* instruction to the jury. The Defendants argued that Plaintiff's conduct during the murder investigation provided probable cause to arrest for Obstruction or Aggravated Battery to a Police Officer. After finding that the evidence presented at trial did not provide probable cause to arrest the Plaintiff for murder, the Seventh Circuit also found that the trial court did not err in failing to deliver the *Devenpeck* instruction to the jury. Instead, Judge Evans opined that the error was made by the Defendants in not asking for the instruction or developing a *Devenpeck* defense.

COMMUNITY INVOLVEMENT

Mysliwy Provides At-Risk Youths a "Reality Check"

On April 16, 2010, Merrillville, Indiana office associate **Teresa Mysliwy** participated in Campagna Academy's yearly "Reality Check" day. This is a program designed to teach at-risk youth the realities of the work world. They are given jobs that they have chosen as well as a "paycheck" and are then sent to various areas to select housing, vehicles, child care, and pay for electricity, water, education and legal representation. The teens are amazed to discover the amount of court costs and fees associated with legal issues such as driving while intoxicated, preparing a will, and going through a divorce, and they always appreciate the experience.

Guolee Appointed to Village of Skokie Centre East Authority Board

On May 17, 2010, Chicago Shareholder **Terrence Guolee** was appointed by the Village of Skokie, Illinois to the The Centre East Metropolitan Exposition, Auditorium and Office Building Authority. This board, consisting of 6 members appointed by the Village of Skokie and 3 members appointed by Niles Township, oversees the operations of the North Shore Center for the Performing Arts, which hosts the Northlight Theater, the Skokie Valley Symphony and various other arts performances throughout the year.

In the opinion, the Seventh Circuit noted that the Defendants never requested a *Devenpeck* instruction during the jury instruction conference. Nor did they ever explain to the district court Judge their theory that probable cause existed to arrest the Plaintiff for crimes other than the ones under which he was charged. Finally, the court also pointed out that the Defendants never requested an instruction informing the jury of the elements of the other crimes. In fact, the first time they raised the *Devenpeck* portion of their probable cause defense was in a reply brief to their motion for a new trial, and the Seventh Circuit found this was far too late and held the Defendants had waived the argument.

The importance of *Devenpeck* in defending False Arrest cases cannot be understated. It is crucial for attorneys representing officers sued for False Arrest to gather all the facts at an early stage to determine whether they support probable cause for crimes other than the ones under which the Plaintiff was actually charged. The first chance defense counsel has to apply the sword of *Devenpeck* is at the summary judgment stage. Should a false arrest claim survive summary judgment, defense counsel needs to be diligent in requesting not only a *Devenpeck* instruction but also instructions on the elements of the other crimes. As the Seventh Circuit's opinion in *Fox v. Hayes* demonstrates, a failure to do so will most likely cut off the *Devenpeck* issue on appeal.

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***Patrick Connelly**, an associate in our Chicago office, concentrates his practice in municipal defense and general litigation. He has successfully defended a number of §1983 lawsuits for municipalities including the Cook County Sheriff's Office and the City of Aurora. In addition to defending §1983 suits, Mr. Connelly provides counsel to our municipal clients on the issues they encounter daily, including tax issues, ordinance adoption, and allocation of federal funding.*

Mr. Connelly was able to gain valuable litigation and practical experience during law school, serving as a 711 Clerk in the Felony Trial Division of the Cook County State's Attorney's Office where he prosecuted more than ten felony bench trials to verdict. Prior to that, he served as a judicial extern for the Honorable Thomas Hoffman of the First District Appellate Court and as a law clerk for the Cook County Sheriff's Office.

If you have any questions regarding this article, please contact Pat via pconnelly@querrey.com, or via 312-540-7556.

Schoumacher Published In New IICLE Publication re: Construction Law

On April 23, 2010, the Illinois Institute for Continuing Legal Education, published its 2010 edition of CONSTRUCTION LAW: TRANSACTIONAL CONSIDERATIONS. Bruce Schoumacher, Shareholder and Co-Chair of the firm's construction practice, authored the *Construction Insurance* chapter of the book, a copy of which is attached for your convenience.

For more information about this publication, please visit the IICLE website. For a PDF copy of Bruce's chapter, visit Q&H's website.

SEMINARS

Understanding Copyright Law 2010

Chicago, Illinois - June 17, 2010

E. Leonard Rubin is the designated Chair for this one-day seminar regarding Copyright Law at the Gleacher Center in Chicago, Illinois. The seminar is designed as an introduction for attorneys with limited experience in copyright law and as a review and update for those who need to reacquaint themselves with intellectual property practice and procedure. Technology continues to evolve and the hotly contested DVD-burning issues of last year will give way to new legal issues relating to copyright law. Because of the inevitable uptick of issues, it is essential for practitioners to be familiar with the basic tenets of this important legal area.

For additional information regarding this seminar, please visit the Practising Law Institute website at www.pli.edu.

Construction Lien Law in Illinois

Elk Grove Village, Illinois - June 22, 2010

On June 22, 2010, in Elk Grove Village, Illinois, Querrey & Harrow attorneys will present a one-day seminar entitled **"Construction Lien Law in Illinois.**" This Lorman Education Services seminar is designed for contractors, owners, developers, subcontractors, suppliers, architects, engineers, lenders, accountants, and allied construction professionals. Construction Practice Co-Chair **Bruce Schoumacher** will serve as Moderator for the seminar. Other speakers include **Beverly Berneman**, **Cynthia Garcia**, **John Halstead**, **Thomas Kaufmann**, **Scott Krider**, **Anthony Madormo**, **Jennifer Sackett Pohlenz**, and **Timothy Rabel**.

To receive notification when the brochure for this seminar is published, please email info@querrey.com.